No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1940

LUCIEN H. TYNG, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28–54) is reported in 36 B. T. A. 21; the original opinion of the Circuit Court of Appeals (R. 391–401) is reported in 106 F. (2d) 55, and the opinion of this Court (R. 402) is reported in 308 U. S. 527. The opinion of the Circuit Court of Appeals, on remand (R. 405), is not reported.

JURISDICTION

The order of the Circuit Court of Appeals was entered March 13, 1940. (R. 417.) The petition

for a writ of certiorari was filed June 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals have the power again to affirm the decision of the Board of Tax Appeals after this Court had reversed its original judgment of affirmance?

2. Alternatively, whether, despite such reversal, the Circuit Court of Appeals should have remanded the cause to the Board to redetermine the issue in the light of alleged additional facts which could have been but were not presented to it in the first instance.

3. Whether, in any event, such facts justify the relief sought.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> * * * * *
>
> (i) *Definition of reorganization.*—As used in this section and sections 113 and 115—
>
> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the proper-

ties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

STATEMENT

The facts are fully stated in the petition for writs of certiorari filed by the Government in the cases of *Guy T. Helvering, Commissioner of Internal Revenue* v. *Lucien H. Tyng,* and *Guy T. Helvering, Commissioner of Internal Revenue* v. *William Buchsbaum,* Nos. 537 and 538, October Term, 1939 (pp. 4–8), reference to which is hereby made. Only a brief summary of them is necessary here.

Barstow Securities Corporation owned all of the stock of W. S. Barstow & Company, which in turn owned 55½% of the voting stock of General Gas & Electric Corporation. On February 5, 1929, all of the stockholders of Barstow Securities Corporation, including petitioner, entered into an agreement for the sale of the stock of these corporations to Associated Gas & Electric Company (hereinafter referred to as Associated) for $50,000,000 in cash (R. 32, 104–105, 134, 260).

On February 11, 1929, a supplementary agreement was entered into under the terms of which

the transferors received instead, $34,699,528.54 in cash and $15,208,021.60 (including interest) in unsecured convertible gold debentures, gold debenture bonds and convertible investment certificates issued by Associated (R. 135, 138–139). One of the reasons for receiving payment in part in such obligations was the desire on the part of the petitioner and two other individual Barstow stockholders to minimize income taxes (R. 32, 146, 151–152).

On the theory that the transaction was a sale and not a reorganization within the meaning of Section 112 (i) (1) of the Revenue Act of 1928, the Commissioner included the value of the obligations of Associated received by the petitioner in his gross income for 1929 (R. 20), and as a result of this, as well as certain other adjustments not material here, determined the deficiency here in question (R. 19). The Board of Tax Appeals held that the transaction constituted a reorganization within the meaning of that section (R. 39), and accordingly reduced such deficiency to $157,223.92 (R. 74). The United States Circuit Court of Appeals for the Second Circuit affirmed the Board's decision on this issue (R. 397). This Court reversed the decision of the lower court on the authority of *Le Tulle* v. *Scofield,* 308 U. S. 415, decided the same day, January 2, 1940 (R. 402). The petitioner thereupon filed a petition for a re-

hearing which was denied on January 29, 1940.[1] The basis of the petition for rehearing was the assertion that he had accepted an offer of Associated to exchange the stock he personally held in General Gas & Electric Corporation for stock of Associated, thus acquiring a substantial amount of Associated stock "as a part of the transaction in question," with the result that he had brought himself within the principle laid down in the *Le Tulle* case. (Pet. Rehearing 2–3.)

Despite this Court's reversal of the judgment below and despite the denial of the petition for rehearing, the petitioner moved the lower court (R. 406–407) again to affirm the Board's decision on this question or, alternatively, to—

> remand the case to the U. S. Board of Tax Appeals, with instructions to find the facts in connection with the determination whether Tyng had a stage [sic] in the enterprise through the exchange of stock of the General Gas & Electric Corp. for stock of the Associated Gas & Electric Corp., and convertible debentures, so as to constitute a tax-free transaction,

and also to determine whether or not the debentures had an ascertainable market value when received by the petitioner in 1929.

The petitioner supported this motion by an affidavit of his attorney, Wayne Johnson, in which

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[1] Neither the filing of this petition nor its denial is noted in the record.

it is asserted that he had "retained 7700 shares of common stock" (of Associated) and that the convertible debentures which he had received were substantially equivalent to preferred stock (R. 409). He also filed an affidavit of one William W. Hoppin to the effect that as "a part of the plan of reorganization whereby the Associated Gas & Electric system acquired the General Gas & Electric System," Associated made an offer to acquire all stock of General Gas & Electric Corporation and that "This part of the exchange resulted in Mr. Tyng obtaining 7724.31 shares of Associated Gas & Electric Company Class A Stock for 5149.54 shares of General Gas & Electric Corporation Class B Stock" (R. 413). As disclosed by Wayne Johnson's affidavit, the theory of the petitioner's motion was that, when this Court remanded the case on the basis of the *Le Tulle* decision, it intended the court below to ascertain whether the *Tyng* case was governed by that decision (R. 407–408). The affiant therefore urged that in the light of the newly alleged facts, the decision of the Board herein was not inconsistent with the *Le Tulle* case and should therefore be affirmed (R. 408).

The court below denied the motion. It stated that the petitioner was really asking it to disregard the ruling of this Court to the effect that the transaction under consideration was not a reorganization for reasons other than those discussed in the *Le Tulle* opinion. The court said that it did not so read the mandate; that to do so would be in effect

to hold that this Court's decision was upon a point of law not necessarily involved in the reversal of its judgment.

ARGUMENT

1. The reorganization question is foreclosed. It was decided by this Court at the last term. The additional reasons which the petitioner now gives for claiming that the transfer was nevertheless a reorganization were presented by him for the first time in his unsuccessful petition for a rehearing in this Court, and was founded upon facts not in the record. The Circuit Court of Appeals clearly had no authority to consider them on remand. *In re Potts,* 166 U. S. 263, 266–267; *Gaines* v. *Rugg,* 148 U. S. 228, 239–240; *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 168.

Moreover, the evidence now offered, to the effect that the petitioner acquired stock of Associated in exchange for stock of General Gas & Electric which he had personally held, was clearly waived, for it was expressly stipulated that no further evidence than that already presented would be offered on the reorganization issue. (R. 154–155.)

While the convertibility of the debentures into stock is clearly indicated in the record (R. 138–139, 330), it was neither mentioned in the Circuit Court of Appeals nor by the petitioner (then respondent) in his brief in opposition.

In this situation, we submit that neither point is now available. Cf. *Helvering* v. *Wood,* 309 U. S. 344, decided February 26, 1940.

In any event, even under petitioner's newly stated facts there is no basis for a different result on the merits. Petitioner's acquisition of Associated stock in exchange for General Gas & Electric stock is of no more consequence than if petitioner had acquired it by purchase. The question here is whether petitioner's investment in the Barstow stock has been terminated or in effect preserved by exchange for Associated stock. The answer to that question depends upon what petitioner received in exchange for the Barstow stock; any independent acquisition of Associated stock in any other manner is beside the point.

2. So far as concerns the option to convert the debentures into stock of Associated, petitioner acquired no interest in Associated corporate business until such option was exercised. The option was, however, not exercisable in the taxable year but only after March 1, 1930 (R. 330), and in fact was never exercised.

3. The issue of the valuation of the securities assumes that there was no reorganization and is presented by the petitioner for the first time in his present petition.[2] It was in fact waived, for the

[2] It is to be noted, however, that Buchsbaum made this contention (for the first time) in his motion in the court below after remand, although he had adverted to the fact that the sale of the debentures was restricted in his petition for a rehearing in No. 538, *supra*, p. 16, but only in order to show that he was compelled to retain a "stake" in the enterprise to the point of seeing his investment dwindle as a result of the 1929 crash.

issues were limited by stipulation (R. 156–157) and the Board understood that there was no dispute with respect to valuation (R. 35).

Moreover, the record clearly shows that petitioner elected to take the debentures in lieu of cash (R. 149–172). The restriction upon the sale involved no sacrifice upon his part and did not introduce any element which made the debentures less valuable to him. His purpose in taking them instead of the cash that was offered to him was to give color to his contention that the transaction was a reorganization and not a sale, in order to enable him to avoid the tax. (R. 32.) This purpose would have been nullified if he had made an immediate sale. It is incongruous for one who deliberately chooses debentures in lieu of cash to contend that they are not precise equivalents, and for one who has compelling reasons for holding them to complain of a restriction upon their sale. *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, expressly turned upon the peculiar circumstances of the case and the highly speculative quality of the stock of an oil company (p. 499). We submit that if the point were available, petitioner could not bring his case within the ruling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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